

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

LIBERTY MUTUAL GROUP, INC.,
As subrogee of BODGER SEEDS, LTD.

08 CV 00223 (JSR)

Plaintiff,

- against -

AFFIDAVIT IN SUPPORT

MEDITERRANEAN SHIPPING
COMPANY, S.A.,

Defendant.

-----X

STATE OF NEW YORK)

: SS.

COUNTY OF NASSAU)
TOWN OF MELVILLE)
CLERK'S OFFICE OF THE COUNTY

ALFRED J. WILL, being duly sworn, deposes and says:

1. I am a member of the firm BADIAK & WILL, LLP, attorneys for plaintiff herein. Based upon a review of the file maintained by my office, I am familiar with the facts and circumstances of this matter.
2. I make this affidavit in support of plaintiff's motion for summary judgment.
3. Annexed hereto as Exhibit 1 is the Affidavit of Joseph Apolinar who is employed by Environmental Seed Producers ("ESP"), the consignee of the shipment at issue in this matter. Mr. Apolinar's Affidavit will be referred to herein as the "Apolinar Aff."
4. Annexed hereto as Exhibit 2 is the Affirmation, executed August 7, 2008, of Angelina Mbaga, Managing Director of Maua Arusha, Ltd. ("Maua") located in Arusha, Tanzania. Ms. Mbaga's Affirmation will be referred to herein as the "Mbaga Aff."

5. In or about January 2007, Maua exported a shipment of flower seeds to ESP located in Lompac, California with an invoice value of \$63,688.13. ("Shipment"). The importer of record was listed as Bodger Seeds, Ltd. (Mbaga Aff. ¶ 3 and Exhibit 1 annexed thereto).

6. Mediterranean Shipping Company ("MSC") carried the Shipment from Tanzania to Long Beach, California under bill of lading number MSCUTA011430 dated January 26, 2007 with the notation "CLEAN ON BOARD." The bill of lading also indicates two vessels were involved in the shipment: MSC ROYAL ZANZIBAR and MSC ILONA. Annexed hereto as Exhibit 3 is the applicable bill of lading.

7. The Shipment was carried in container number MSCU1550902 with *carrier's* seal number 1760518 and consisted of "648 bags of flower seeds." See Exhibit 3 annexed hereto. Apparently, the container was initially loaded aboard the ROYAL ZANZIBAR in Tanzania and later transloaded, at an unknown date, aboard the ILONA. (See Exhibit 4 at page 3).

8. When the container left Maua's possession in Tanzania, the vents of the container were completely open and unobstructed and all seeds were dry. (Mbaga Aff. ¶¶ 5, 6).

9. Maua never instructed MSC to cover the vents of the container containing the Shipment (MSCU1550902). The Bill of Lading also indicated the same. (Mbaga Aff. ¶ 7).

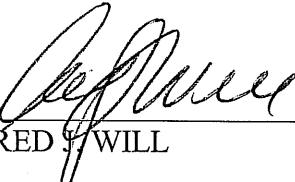
10. When the Shipment arrived at ESP's warehouse in California, the seals of the container were in tact and the vents were completely unobstructed. (Apolinar Aff. ¶¶4, 5).

11. As indicated by reports from surveyors for both Plaintiff and MSC, upon receipt by the consignee, water damage to the seeds was noted. Annexed hereto as Exhibit 4 is a report from Vericlaim, Plaintiff's surveyor. Annexed hereto as Exhibit 5 is a report from Captain Arun K. Jolly of Techno Marine Services, MSC's surveyor.

12. During discovery, Plaintiff requested in its document demand log books for both vessels involved in this shipment. Defendant did not produce any log books and, with respect to the vessels, only produced Bay Plans for the MSC ILONA. Annexed hereto as Exhibit 6 is MSC's Response to Plaintiffs' [sic] First Set of Requests for Production dated July 21, 2008.

13. On July 21, 2008, my office sent a written request specifically demanding ventilation records in connection with the shipment of the flower seeds. This request followed-up an earlier request for same. To date, my office has never received the requested ventilation records. Annexed hereto as Exhibit 7 is a true and accurate copy of the July 21, 2008 letter. (Portions of this letter have been redacted as they may, arguably, pertain to settlement discussions).

14. Plaintiff's damages amount to \$61,899.35. This amount represents damage to 636 bags of flower seeds. (See Exhibit 4 [Vericlaim Survey] at pages 6-8.



ALFRED S. WILL

Sworn to before me this
4 day of August 2008



LISA A. SCOGNAMILLO
NOTARY PUBLIC

LISA A. SCOGNAMILLO
Notary Public, State of New York
No. 5011463
Qualified in Nassau County
Commission Expires Apr 19, 2011

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
LIBERTY MUTUAL GROUP, INC.,
As subrogee of BODGER SEEDS, LTD.,

08 CV 00223 (JSR)

Plaintiff,

AFFIDAVIT

- against -

MEDITERRANEAN SHIPPING
COMPANY, S.A.,

Defendant.

-----X

STATE OF CALIFORNIA)
SS.
COUNTY OF Santa Barbara

JOSEPH APOLINAR, being duly sworn, deposes and says:

1. I am employed by Environmental Seed Producers ("ESP") and, at all material times, was assigned to the Shipping and Receiving Department.
2. On or about April 4, 2007, container number MSCU1550902 ("Container") was delivered to ESP's warehouse in Lompoc, California.
3. I was personally responsible for unloading the Container which held a shipment of 648 bags of flower seeds transported from Tanzania to Long Beach, California.
4. The Container was delivered to ESP's warehouse with the seals in tact. I personally cut the seals prior to unloading.
5. I personally observed the vents of the Container and observed that all vents were open and completely unobstructed when the Container arrived at ESP's warehouse. There was no cellophane or any other material covering any of the vents.

6. At the time the Container left ESP's warehouse, there was no covering of any kind over any of the vents.

Joe Apolinar

JOSEPH APOLINAR

Sworn to before me this
____th day of July, 2008

See attached
NOTARY PUBLIC

CALIFORNIA JURAT WITH AFFIANT STATEMENT

- See Attached Document (Notary to cross out lines 1–6 below)
 See Statement Below (Lines 1–5 to be completed only by document signer[s], not Notary)

1	
2	
3	
4	
5	
6	

Signature of Document Signer No. 1

Signature of Document Signer No. 2 (if any)

State of California

County of Santa Barbara

Subscribed and sworn to (or affirmed) before me on this

24th day of July, 2008, by

(1) JOSE APOLINAR,
Name of Signer

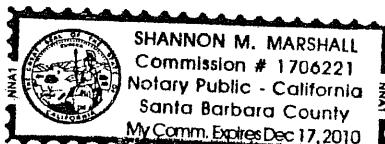
proved to me on the basis of satisfactory evidence
to be the person who appeared before me (.) (,)

(and)

(2) _____,
Name of Signer

proved to me on the basis of satisfactory evidence
to be the person who appeared before me.)

Signature Shannon M. Marshall
Signature of Notary Public



Place Notary Seal Above

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Further Description of Any Attached DocumentTitle or Type of Document: AffidavitDocument Date: 7/24/08 Number of Pages: 1

Signer(s) Other Than Named Above: _____

RIGHT THUMBPRINT OF SIGNER #1

Top of thumb here

RIGHT THUMBPRINT OF SIGNER #2

Top of thumb here

EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LIBERTY MUTUAL GROUP, INC.,
as subrogee of BODGER SEEDS, LTD.,

Plaintiff,

08 CV 00223 (JSR)

- against -

AFFIRMATION

MEDITERRANEAN SHIPPING
COMPANY, S.A.,

Defendant.

X

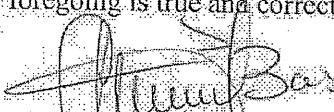
ANGELINA MBAGA declares, under penalty of perjury under the laws of the United States of American pursuant to 28 U.S.C. § 1746 (1), that the following is true and correct:

1. I am employed by Maua Arusha, Ltd. ("Maua") in Arusha, Tanzania.
2. Maua Arusha Ltd. is in the business of exporting flower seeds. I have personally been involved in this business from 1998 to the present.
3. In or about January 2007, Maua Arusha Ltd. exported a shipment of flower seeds to Environmental Seed Producers located in Lompoc, California, with an invoice value of \$63,688.13 ("Shipment"). The importer of record for the Shipment was listed as Bodger Seeds, Ltd. A copy of the invoice pertaining to the Shipment is annexed hereto as Exhibit 1.
4. I have personal knowledge of the Shipment. The Shipment was carried to the United States by Mediterranean Shipping Company, S.A. ("MSC").
5. The seeds in the Shipment were exported dry.
6. Maua Arusha Ltd did not cover the vents of the container in which the seeds were stored prior to shipment, and the vents were indeed open and unobstructed at the time of shipment.

7. Maua Arusha Ltd never instructed MSC to cover the vents of the container containing the shipment.

I declare, under penalty of perjury under the laws of the United States of America pursuant to 17 U.S.C. §1746 (1) that the foregoing is true and correct.

Executed on: August 07, 2008


Signature - Angelina Mbaga

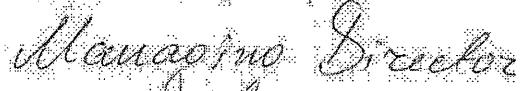
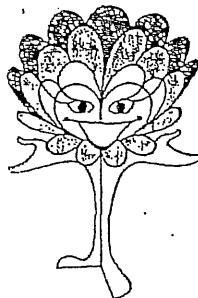
Title:  Manager Director

EXHIBIT 1



Maua Arusha Ltd.
P.O. Box 15002
Arusha Tanzania
E-mail: maua_arusha@yahoo.com
Mobile: (00 255) (0) 754 27 35 69
Managing Director:
Msc. Agric Angelina Dimitrova Mbaga



000034

S TAX INVOICE R

To: Environmental Seeds Producers
1851 W. Olive Ave.
Lompoc
CA 93436
United States of America

Importer of Record: Bodger seeds Ltd.
1800 N. Tyler Ave.
S. El. Monte, CA 91733-3618
United States of America

Clearing and Forwarding:
Expeditors International
Ken Sakurai
5200 W. Century Blvd., Suite 100
Los Angeles, CA 90045
United States of America

ITEM NUMBER	ITEM DESCRIPTION	QTY IN KILO	UNIT PRICE IN USD	TOTAL AMOUNT IN USD
19023	Tropaeolum Maj. Scarlet Gleam	500.00	3.78	1,890.00
19135	Zinnia El. Tetra State Fair Mix	121.00	8.00	968.00
17948	Tagetes Pat. Brocade Mixed	30.00	6.00	180.00
19028	Zinnia El. Dahliafl. Canary Dini	80.00	8.00	640.00
17947	Tagetes pat. Nana Petite yellow	49.00	7.00	343.00
19022	Tropaeolum maj. Golden Gleam	426.00	3.78	1,610.48
19025	Tropaeolum Nanum Alaska Mix	327.00	3.78	1,236.06
19015	Tropaeolum Nanum Empress of India	669.00	3.78	2,528.82
19027	Tropaeolum maj. Cherry Rose	193.50	3.78	731.43
19131	Zinnia El. Willy Rogers	79.00	8.00	632.00
19026	Tropaeolum maj. Tall Sgl. Mixed	641.00	3.78	2,422.98
19024	Tropaeolum Maj. Glorius Gleam Mix	242.00	3.78	914.76
19014	Tropaeolum nanum Whirlybird Mix	500.00	3.78	1,890.00
17939	Thunbergia Alata Mix	112.00	20.90	2,340.80
17950	Tropaeolum Maj. Dwarf Jewell Mixed	12,000.00	3.78	45,360.00
VAT 0%				
TOTAL				63,688.13
TOTAL AMOUNT DUE: Sixty Three Thousand Six Hundred Eighty Eight and Thirteen Cts. Only				

P R O D U C T

S

Terms: Payment within 60 days after date of invoice. Payment to be made in Euro by Swift Transfer.
Maua Arusha Ltd., c/o CRDB Bank, Arusha Branch-Arusha-Tanzania, Acc.no.19J103/106 6300, Swift Code: CORU TZTZ XXX

EXHIBIT 3

EXHIBIT 4



Providing claims services to the insurance industry since 1918
A member of VTS Uni**vers**e
adjusters network LLC

700 South Flower Street - Suite 23
Los Angeles, California 90017
Tel 213.943.5000
Toll Free 800.999.0400
Fax 213.943.5000

MARINE CARGO SURVEY REPORT NO. LAX07288500/TMS/DWB

Examined For The Account Of Whom It May Concern

At The Request Of

Liberty International Underwriters
55 Water Street, 18th Floor
New York, NY 10041
**Your Reference No.: Bodger Seeds/
LIU #4NMAR-99016**

RE: **Vessel** : "MSC ILONA" V.0701A

Arrival : Long Beach, California; on or about April 4, 2007

Bill of Lading No. : TANG/LONG BEACH; No. MSCUTA011430

Container No. : MSCU1550902

Shipment : 648 Bags of Flower Seeds

Assured : Environmental Seed Producers

Policy No. : APPOMCSE018791006

THIS IS TO CERTIFY THAT:

BACKGROUND:

Survey was requested on April 13, 2007, by Fred Fernandez of Liberty International Underwriters.

At the time of assignment, no dollar amount of loss was provided to us. It was reported that the stated shipment had suffered water damage.

SURVEY REPORT NO. LAX07288500/TMS/DWB PAGE NO. 2**SHIPMENT PARTICULARS:**

Shipment: 648 Bags of Flower Seeds, Weighing 15,969.5 Kilos:

Item No.	Item Description	Qty in Kilo	Number Of Bags	Bag Number
19023	Tropaeolum Maj. Scarlet Gleam	500.00	20	1-20
19135	Zinnia El. Tetra State Fair Mix	121.00	5	21-25
17948	Tagetes Pat. Brocade Mix	30.00	3	26-28
19028	Zinnia El. Dahliafl. Canary Bird	80.00	4	29-32
17947	Tagetes Pat. Nana Petite Yellow	49.00	4	33-36
19022	Tropaeolum Maj. Golden Gleam	426.00	17	37-53
19025	Tropaeolum Nanum Alaska Mix	327.00	13	54-66
19015	Tropaeolum Nanum Empress of India	669.00	29	67-95
19027	Tropaeolum Maj. Cherry Rose	193.50	8	96-103
19131	Zinnia El. Willy Rogers	79.00	4	104-107
19026	Tropaeolum Maj. Tall Sgt. Mix	641.00	26	108-133
19024	Tropaeolum Maj. Glorious Gleam Mix	242.00	10	134-43
19014	Tropaeolum Nanum Whirly Bird Mix	500.00	20	144-163
17939	Thunbergia Alata Mix	112.00	5	164-168
17950	Tropaeolum Maj. Dwarf Jewell Mixed	12,000.00	480	169-648

SURVEY REPORT NO. LAX07288500/TMS/DWB PAGE NO. 3

Invoice No: 48 dated January 3, 2007; US\$63,688.13 basis for the entire shipment.

Shipper: Maua Arusha Ltd.
P.O. Box 15002
Arusha, Tanzania

Consignee: Environmental Seed Producers
1851 West Olive Avenue
Lompoc, CA 93436

TRANSIT DETAILS:

The shipment was loaded onboard the M/V "ROYAL ZANZIBAR" V.56R on January 26, 2007, in the Port of Tanga, Tanzania and transported to Long Beach, arriving on April 4, 2007. The shipment had been transloaded onboard the M/V "MSC ILONA" V.0701A; however, we were unable to determine the port or date of the transload.

EXCEPTIONS:

No exceptions were taken at the time of delivery.

SURVEY / INVESTIGATION FINDINGS:

Attendance Date and Location:

- April 17, 2007 at Environmental Seed Producers, 1851 West Olive Avenue, Lompoc, CA 93436

Parties in Attendance:

- Capt. Arun Jolly, Techno Marine Services on behalf of Carrier's interests.
- Ms. Anita Laemoa of Environmental Seed Producers
- Dennis Berri, Senior Surveyor, Vericclaim, Inc., on behalf of Underwriter's interests.

NARRATIVE:

Subsequent to receiving this assignment, contact was made with the Ultimate Consignee and an appointment was arranged to complete a joint survey with the carrier's surveyor on April 17, 2007. Upon arrival at the Consignee's facility, we were escorted to the warehouse, where the shipment was being held, pending our arrival. At that time we found a total of 648 bags containing various types of flower seeds as seen in the attached **Photographs Numbered 1 through 24**. It was noted that the packaging utilized was polystyrene woven plastic bags, which were double sewn closed. No inner lining was utilized within the woven plastic bags. Initial examination of the bags showed signs of rust marks on the exterior of numerous bags, along with water staining. We also noted signs of water condensation within the shrink-wrap, which was holding the bags in place on wood pallets, where they were being stored on.

Initially, we noted a number of different types of style species and seeds to be included in those shipments. The following is a breakdown of the quantity of bags per species:

Item No.	Item Description	Qty in Kilo	Number Of Bags
19023	Tropaeolum Maj. Scarlet Gleam	500.00	20
19135	Zinnia El. Tetra State Fair Mix	121.00	5
17948	Tagetes Pat. Brocade Mix	30.00	3
19028	Zinnia El. Dahliafl. Canary Bird	80.00	4
17947	Tagetes Pat. Nana Petite Yellow	49.00	4
19022	Tropaeolum Maj. Golden Gleam	426.00	17
19025	Tropaeolum Nanum Alaska Mix	327.00	13
19015	Tropaeolum Nanum Empress of India	669.00	29
19027	Tropaeolum Maj. Cherry Rose	193.50	8
19131	Zinnia El. Willy Rogers	79.00	4
19026	Tropaeolum Maj. Tall Sgt. Mix	641.00	26
19024	Tropaeolum Maj. Glorious Gleam Mix	242.00	10
19014	Tropaeolum Nanum Whirly Bird Mix	500.00	20
17939	Thunbergia Alata Mix	112.00	5
17950	Tropaeolum Maj. Dwarf Jewell Mixed	12,000.00	480

SURVEY REPORT NO. LAX07288500/TMS/DWB PAGE NO. 5

It was noted that there was actually only four (4) types of actual species; however, that the different item numbers are different colors and variations of those species. We therefore had the Consignee open up a random sampling of each type of seed in an effort to ascertain the condition of the seeds within the plastic bags. The first item examined was the Tropaeolum (Renuncula). Illustrations of the seeds, which were found in the sampling of those bags, can be seen in **Photographs Numbered 4 through 15, 17 and 18**. It was noted the seeds had experienced contact with moisture, causing the seeds to shrink and become a dark color, as well as bunching together and becoming moldy to varying degrees.

The second type of seeds examined consisted of the Zinnia. Illustrations of the condition of this particular seed and sampling examined can be seen in **Photograph No. 16**. No signs of obvious damage were noted to this particular seeds; however, the Consignee stated that the seeds did feel slightly wet to the touch and may have been affected.

The third type of seed, which was examined from the sampling, was from the Tropaeolum species. Illustrations of the condition of this species can be seen in **Photographs Numbered 19 and 20**. No signs of obvious damage were noted to the seed; however, once again the Consignee expressed concern as to the fact that the seeds felt slightly wet to the touch.

The fourth and last type of seed, which was sampled consisted of the Tagetes, which was also known as Black Lily. Illustrations of the condition of that seed can be seen in **Photographs Numbered 21 through 24**. Once again, we noted no signs of obvious damage to the seed; however, the Consignee was concerned that the seeds felt moist to the touch.

During our conversations with the Consignee, we inquired as to whether the contents of the bags can be skimmed with the portion of the seeds, which were obviously affected by moisture being removed with the balance of the shipment being utilized for its intended purpose. The Consignee stated the only way that they would be able to evaluate the condition of the seed would be to take a random sampling from good bags and bad bags and send them to a lab and have them tested for germination capabilities. Apparently, the laboratory uses chemicals to plant the seeds and observe the germination process to determine if the seeds were affected. The laboratory would then arrive at a percentage of the seeds, which they would consider to be non-useable, with the balance being acceptable. We therefore advised the Consignee that this should be undertaken in an effort to minimize the loss and to determine the actual extent of the damages.

Subsequent to our surveying the seeds in question, we were taken to the Consignee's office and provided with a CD of the photographs showing the condition of the load at the time of delivery. We noted that there was heavy rust stains and obvious signs of

SURVEY REPORT NO. LAX07288500/TMS/DWB PAGE NO. 6

water contact to numerous bags at the time of devanning. We also noted signs of a white residue supposedly caused due to the contact with moisture on the walls of the container. We inquired as to whether there was any obvious defects to the container at the time of delivery; at which time the Consignee advised us that they noted no signs of obvious defects; however, did comment that the majority of the wet bags were found along the walls of the container and at the rear doors.

During our conversations with Capt. Jolly, the surveyor for the carrier, we were advised that he did complete a survey of the container at the dock prior to it being loaded out onto another vessel. He further stated that the container, at the time of survey was fully loaded with an outbound load therefore, he was unable to visually examine the interior of the container. We were shown the photographs; however, he stated that he would be unable to release the photographs to us without the carrier's permission. We were provided with the name of the Claims Department and we will be contacting them in an effort to obtain copies of these photographs in question. We can state that our examination of the photographs we were being shown, showed no obvious signs of defects to the container.

Subsequent to our original survey, we have been advised by the laboratory that our sampling of the packaging proved negative, indicating that the wetting was caused by fresh water. We attached to this report a copy of the Laboratory Analysis from A.J. Edmond Company regarding the salinity of the sampling examined.

We also attached to this report a copy of the email correspondence between the Consignee and the carrier placing them on notice of claim.

We have also received the results of the laboratory tests of the seeds in question. The Consignee had dried and forwarded a sampling of the seed bags from each species to the lab for testing. The lab results showed that the Russl Minimum Germination Percentage Acceptable for the various seeds were either 60% to 65%, which varied by species. Subsequent to the test being completed, it appears that all but three (3) species type failed to meet the germination minimum qualifications. The balance of the shipment has been rejected by the Consignee.

The claim as presented by the Consignee is as follows:

Item No.	Item Description	Qty. in Kilo	Unit Price In USD	Total Amount In USD
19023	Tropaeolum Maj. Scarlet Gleam	500.00	3.78	1,890.00
17947	Tagetes Pat. Nana Petite Yellow	49.00	7.00	343.00
19022	Tropaeolum Maj. Golden Gleam	426.00	3.78	1,610.28

SURVEY REPORT NO. LAX07288500/TMS/DWB PAGE NO. 7

19025	Tropaeolum Nanum Alaska Mix	327.00	3.78	1,236.06
19015	Tropaeolum Nanum Empress of India	669.00	3.78	2,528.82
19027	Tropaeolum Maj. Cherry Rose	193.50	3.78	731.43
19131	Zinnia El. Willy Rogers	79.00	8.00	632.00
19026	Tropaeolum Maj. Tall Sgt. Mix	641.00	3.78	2,422.98
19024	Tropaeolum Maj. Glorious Gleam Mix	242.00	3.78	914.78
19014	Tropaeolum Nanum Whirly Bird Mix	500.00	3.78	1,890.00
17939	Thunbergia Alata Mix	112.00	20.90	2,340
17950	Tropaeolum Maj. Dwarf Jewell Mixed	12,000.00	3.78	45,360.00

Subsequent to receiving a Sales Authorization for the rejected portion of the shipment, the goods has been placed out for salvage bid. The highest bid being \$1,176.00. The check has been forwarded to the Consignee made payable in that amount and should be taken into consideration should any adjustment be made to this claim.

CAUSE OF DAMAGE:

Based on the documentation, the damages appear to have occurred during transit. Since we were unable to survey the empty container, we were unable to comment as to its condition, other than to state, we noted no obvious damages to it during our review of Capt. Jolly's photographs.

Based on the chloride tests completed by the laboratory, the wetting was due to contact with fresh water.

DISPOSITION:

The rejected portion of the shipment has been placed out for salvage bid and sold for \$1,176.00.

A SUMMARY OF THE LOSS:

The extent of loss can be summarized as follows, subject to the terms and conditions of the policy of insurance:

Bill of Lading No.: MSCUTA011430

Shipment: Flower Seeds

Container No.: MSCU1550902

Invoice Value \$63,688.13

Quantity Sound: 12 Bags

Quantity Damaged: 636 Bags

Type of Damage: Water damage

Disposition: The rejected portion of the shipment salvaged for \$1,176.00.

RECOVERY TABLE:

1.

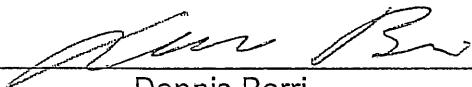
Name of Carrier:	Mediterranean Shipping Co. (USA), Inc.
Address:	420 Fifth Avenue, 8 th Floor New York, NY 10018
Notified:	Yes, on April 10, 2007, by Consignee.
Response:	Joint survey completed with Steamship Line Surveyor
Delivery Documents:	Requested, but not received
Exceptions:	No exceptions taken

There is a total of **39 Photographs** depicting the conditions of the shipment at the time of our survey has been previously submitted with our Preliminary Report.



All of our actions in this matter were without prejudice and subject to the terms and conditions of the policy of insurance.

VeriClaim



Dennis Berri
Senior Marine Surveyor

Los Angeles, California
August 9, 2007

DWB:vbl